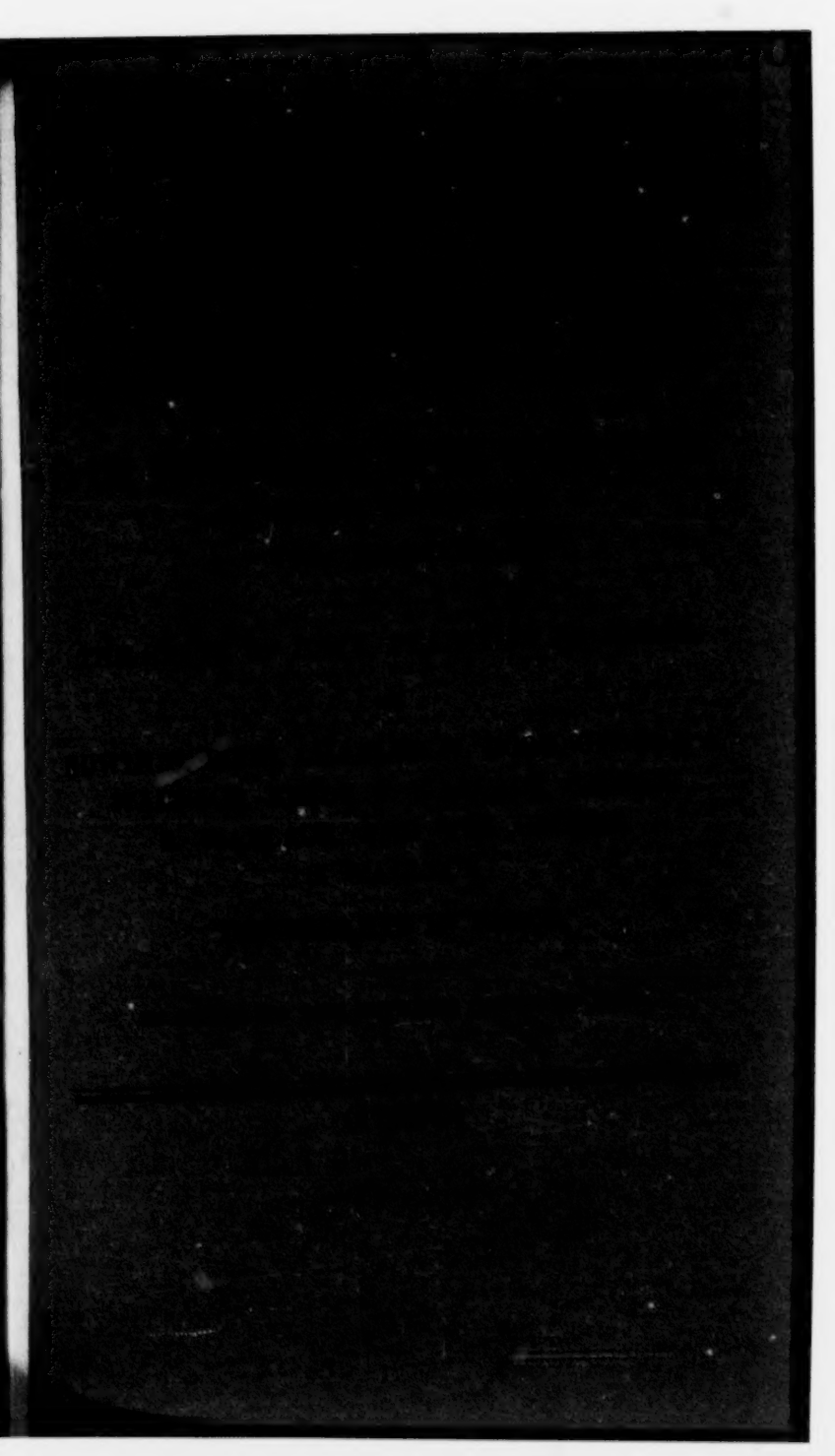

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Term Number 52.

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

BRIEF UPON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

In addition to the facts set forth in the motion to dismiss writ of error by the defendant in error, we submit the following:

The controversy in this case is as to the title of the land which constituted the lake bed what is known as Owl Lake in Humboldt County, Iowa.

Suits in equity were brought by Edwin O. Rood and Charles W. Rood against George A. Wallace, Emily J. Wallace, George S. Wallace and Mrs. George S. Wallace, by George R. Pearsons against A. F. Johnson and Mrs. A. F. Johnson, by George R. Pearsons against George A Wallace and Emily J. Wallace, by Edwin O. Rood and Charles W. Rood against B. D. Barrett and Melinda Barrett, and by Edwin O. Rood and Charles W. Rood against James O'Connell and Mrs. James O'Connell, claiming title to the lake bed as grantees through mesne conveyances from Humboldt County, Iowa, claiming that the land in controversy is swamp land, and under the act of congress of September 8th, 1850 was granted to the state of Iowa, and passed to Humboldt County under an act of the state legislature granting swamp land to the counties in the state in which they were situated.

It was claimed by the plaintiffs in the state court that the defendants wrongfully entered upon the land as the property of the United States for the purpose of pre-empting the same.

The State of Iowa, plaintiff in error herein, intervened in each of the suits, claiming that the land in question is the property of the state, and does not belong to either the plaintiffs or the defendants.

Each suit involves a different tract of land, but all lie within the bed of what is known as Owl Lake. The description of the different tracts of land so claimed, appears in paragraph seven of the petitions of the plaintiffs in the state court, and are set out in full upon pages 2-15 and 16 of the transcript, and it is not deemed necessary to repeat the same. The evidence was taken in all the cases at the same time, and so far as practicable applies to each.

The supreme court of the state of Iowa decided adversely

to the claim of the state, and the opinion rendered herein appears upon pages 86-87-88-89-90 and 91 of the transcript of the record.

After this opinion was handed down by the state court, a petition for a re-hearing was filed by counsel for the state which was by the state court overruled; upon the overruling of this petition, a petition for a writ of error, writ citation and assignment of errors were filed in the office of the clerk of the supreme court, such petition being set forth on pages 91 and 92 of the transcript of the record.

A writ of error was issued by the supreme court of the United States to the state court, upon the petitions of the plaintiff in error, and the cause is now in this court for hearing, in pursuance of such writ.

A motion has been filed by defendants in error to dismiss the writ, upon the ground that no federal question is involved in the case, and that there has not been drawn into question the validity of any treaty or statute of, or authority excercised by or under the United States, the decision whereof has been against the validity of such federal questions treaty, statute or authority.

Before taking up the question as to whether such motion should be sustained, we will briefly state the facts which appear of record in the cases named.

Owl Lake is about two miles in length, and of an average width of about one mile. It lies in Township 92, Range27, west of the fifth principal meridian, and the lands bordering thereon were surveyed and platted by the general government in 1851.

The lake was meandered by the government survey, and the lands bordering thereon were divided into subdivisions, many of them were irregular lots, as shown by the plat,

which appears at page 61 of the transcript. Some of the lots so surveyed are indicated on the book of original entries as swamp lands, and all were sold during the years from 1855 to 1858.

On the south, east, north and part of the west, were well-defined shore lines and banks. On the northwest were low lands and sloughs, through which the water flowed into the lake; the same is true of the west end of the western arm of the lake. The water from six to ten sections of land drained into the lake. The outlet was on the east side, near the southeast corner.

Timber grew upon the banks of the lake at different places, and quite a body existed on the south side. There was an island in the lake upon which timber grew.

There is no testimony of any living witness, who had seen the lake after its survey prior to 1856. Mr. John Johnson saw it about the first of August, 1856; he went around the southeast corner, but did not examine it carefully. He saw clear water, but his general impression was that the lake had largely grown up with weeds and water lilies during that season which was dry. He saw water free from vegetable growth. He was again at the lake in 1875, and saw clear water. Several witnesses saw the lake in 1862 and 1863, and some afterward from 1867 to 1871. These witnesses describe the lake somewhat differently, according to the dryness or wetness of the season in which they saw it, some describing it as having a considerable portion of clear water, and others as a marsh grown up with lilies and bulrushes.

In 1884 a ditch was excavated for the purpose of draining the lake, and this ditch was enlarged and deepeded in 1894. In January, 1897, a contract was entered into between the board of supervisors of Humboldt County and the Fort

Dodge and Fort Ridgley Railroad Company, which provided for the granting of all the swamp lands belonging to Humboldt County to such railroad company, upon the conditions named in such contract.

This contract is set forth upon pages 4-5-6-7 and eight of the transcript.

In 1895, George R. Pearsons and others, having obtained a claim to the land embraced within the meander lines of Owl Lake from Humboldt County, and having drained the same, induced the governor of the state of Iowa to request the commissioner of the United States Land Office to issue a patent to the state for the land in controversy, describing it as the unsurveyed portions of Sections 21, 22, 27and 28, in Township 92, Range 27, west of the fifth principal meridian, under the swamp land act, and afterward a patent was issued.

Four propositions were relied upon by the plaintiff in error in the state courts, viz:

First. That the lake beds of all meandered lakes and streams in the state belong to the state of Iowa, in trust for the public, by virtue of its sovereignty, and this right does not depend on any act of congress or grant from the United States.

Second. That the survey of the public lands of the United States, the approval of such survey by the land commissioner of the United States or the secretary of the interior, and the sale of lands under such survey, fixes the status of the meandered lakes and streams—except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the land department.

Third. That the land commissioner of the United States

government has no authority, by act of congress or under the constitution, to patent to the state of Iowa any lake beds which had been meandered and were already the property of the state.

Fourth. That the governor of the state of Iowa was unauthorized by any law, to request the land commissioner of the United States to issue a patent for the land in controversy.

Hence, the two patents, first from the United States to the state of Iowa, and from the state of Iowa to Humboldt County, are wholly void.

Each of these propositions was determined adversely to the plaintiff in error by the supreme court of Iowa, and eight errors are assigned and now presented to this court for its determination thereof. The assignment of errors appears upon pages 93 and 94 of the transcript of the record.

CHARLES W. MULLAN, Attorney General,
For Plaintiff in Error.

BRIEF AND ARGUMENT UPON MOTION TO DISMISS.

I.

It is contended by defendants in error:

First. That no federal question is involved in this case, and that there has not been drawn into question the validity of any treaty or statute of the United States, or of any authority exercised by it, the decision whereon has been against the validity of such treaty, statute or authority; nor has there been drawn into question in this cause the validity of any statute of, or authority exercised under any state, on the

ground that such statute or authority is repugnant to the constitution, treaties or laws of the United States the decision whereon has been in favor of the validity thereof; nor has any claim been made in this cause of or to any title, right, privilege or immunity under the constitution, or any treaty or statute of or commission held or authority exercised under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

Second. If any federal question was involved in this cause when the same was pending in the supreme court of Iowa upon appeal, whatever the decision of that court thereof, if any may have been, another question, not federal, was also involved and decided adversely to the plaintiff in error, and the decision of this latter question is sufficient to sustain the judgment of that court, irrespective of what its decision, if any, may have been upon such federal question.

It is the contention of plaintiff in error:

First. That there is drawn in question in this cause a title and right claimed by the plaintiff in error, under the constitution of the United States, and under a treaty and statute thereof, and under authority held and excercised by the United States, the decision of the state court whereon is against the title and right specially set up and claimed by the plaintiff in error, under the constitution, statute and authority of the United States, and that the right of the plaintiff in error to have such question re-examined, and the decision of the state court reversed or affirmed thereon by this court upon the writ of error, is authorized by Section 709 of the Revised Statutes of the United States.

Second. That no other question was involved in the cause decided adversely to the plaintiff in error by the state court

upon which the judgment of such court can be sustained irrespective of its decision upon the federal question involved in this cause.

These propositions will be considered in the order stated:

II.

IS THERE A FEDERAL QUESTION INVOLVED IN THIS CASE?

In paragraphs 1, 2, and 3 of the petition of intervention filed in the state court by the plaintiff in error, and upon which its claim to the land in question was tried, the claim is broadly made that the land in controversy was, and is, a part of the lake bed of the lake known as Owl Lake, lying wholly within the state of Iowa, and that the same did not constitute any part of the land which the United States government was authorized or empowered to sell.

That when the state was admitted into the Union, it became the owner of all lakes within its borders, under its sovereign right, subject to the right of the public to use the same, and that the title to the lake in question and the soil underneath the same at once became vested in the state, under the constitution and treaties of the United States.

That the United States government in surveying the public lands adjoining the lake in controversy, meandered the lands bordering thereon, and excluded the lake, and the soil underneath all the waters thereof from the government survey, under the authority of the statutes of the United States, and the rules and regulations of the department of the interior, as the property of the state of Iowa, in which the general government held no right or title.

Under the claim so made by the plaintiff in error, the question is directly presented to this court whether such claim constitutes any title or right under the constitution of the United States, or under any treaty or statute thereof, or under any authority held or exercised under the government of the United States.

If the claim of the defendant in error falls within the provisions of Section 709 of the judiciary act of the United States we are confronted with a second question which at once arises, viz: is the decision of the state court against the claim of title and right of the state to the land in question, such a decision against the title and right, privilege or immunity specially set up or claimed under the constitution, treaty, statute or authority of the United States as may be re-examined, reversed or affirmed by this court upon a writ of error?

It is now generally conceded that the territory out of which the state of Iowa was carved became a part of the territory of the United States under the treaty of 1803 between France and the United States, by which the territory of ~~Illinois~~ Louisiana was ceded to the United States. It is true that Virginia had, prior to that time claimed that its title to what was known as the northwest territory, included the territory which is now the state of Iowa, but such claim was never established by Virginia, or recognized, either by the United States or France prior to the treaty of 1803.

It is, however, immaterial to the solution of the questions involved in this case whether Virginia or France was the owner of such territory prior to its acquisition by the United States.

Under the act of the Virginia legislature of September 6th, 1780, by which the lands then claimed by that state northwest of the Ohio river were ceded to the United States, this condition was imposed upon the United States when it accepted that territory "subject to the terms and conditions contained in the before recited act of congress of the thirteenth day of September last. That is to say: Upon the condition that the territory so ceded shall be laid out and formed into states containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, but as near thereto as circumstances will permit; and that the states so formed shall be distinct republican states, and admitted members of the federal union, having the same rights of sovereignty, freedom and independence as the other states."

It is, of course, well known to this court, that at the time of the formation of our government, the United States neither owned nor held any lands under its right of sovereignty. All lands and all rights which it thereafter acquired in what has been generally known as the public domain came, through deeds of cession from the thirteen original states, and through treaties with other nations afterward negotiated by the general government.

Virginia was the first state to cede its unoccupied territory to the United States, and its deed of cession was used as a model by the other states in ceding the lands to which they claimed title.

Under the condition above quoted, every state erected out of the territory so ceded to the United States, when admitted into the Union, took and retained the same rights of sov-

ereignty freedom and independence as was previously held by each of the thirteen original states.

One of the rights of sovereignty so possessed by these states, was the title to all of the waters within the state and the soil underneath the same; so that whatever right the United States acquired in the territory of Iowa by the Virginia cession, the condition incorporated in such cession gave to Iowa, when it was admitted into the Union, every sovereign right theretofore possessed by the state of Virginia.

If the title to the territory now embraced within the boundaries of the state of Iowa came to the United States through the treaty with France negotiated on the thirtieth day of April, 1803, it is important that we turn to the provisions of that treaty for the purpose of determining upon what conditions the United States took such territory.

Article 3 of the treaty of cession with France provides:

"The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

By act of congress of December 28th, 1846, Iowa was admitted into the union, and her standing as a sovereign state was fixed by such act of congress in these words:

"That the state of Iowa shall be one, and is hereby declared to be one of the United States of America, and admited into the Union on an equal footing with the original states in all respects whatsoever."

It is therefore clear that under the deed of cession from Virginia, so far as Virginia had any claim to the territory now embraced within the boundaries of the state, and under

the treaty of 1803 between the United States and France, and under the act of congress 1846 admitting Iowa into the Union, that state when it became one of the states of the Union became possessed of every right, advantage and immunity which had theretofore been possesed by the original thirteen states.

This principle was determined by this court in Pollard's Lessee v. Hagen et al., 3 Howard, 212.

Mr. Justice McKinley, in delivering the opinion of the court, said:

"All that part of Alabama which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the state of Georgia to the United States, by deed bearing date of the twenty-fourth day of April, 1802, which is substancially, in all of its principles and stipulations like the deed of cession executed by Virginia to the United States on the first day of March, 1784, by which she ceded to the United States the territory northwest of the river Ohio. Both of these deeds of cession stipulated that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever.

"And the deed of cession by Georgia it is expressly stipulated 'that the territory thus ceded shall form a state, and be admitted as such into the Union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner as is provided in the ordinances of congress of the thir-

tenth day of July, 1787, for the government of the northwest territory of the United States, which ordinance shall, in all of its parts, extend to the territory contained in the present act of cession, that article only accepted which forbids slavery.'

"When Alabama was admitted into the Union on an equal footing with the original states she succeeded to all of the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except as so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided for in the deed of cession, and the legislative acts enacted with it.

"Nothing remained to the United States, according to the terms of the agreement, but the public lands; and, if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of the state or else where, except in the cases in which it is expressly granted.

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on equal footing with the original states, the constitution, laws and compact to the contrary notwithstanding.

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes belongs exclusively to the states within their respective territorial jurisdictions, and they and they only have the constitutional power to exercise it."

In Martin v. Waddell, 16 Peter, 410, it is said:

"When the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subjet only to the rights since surrendered by the constitution to the general government."

The principle announced in this case has since been approved and followed by this court.

Withers v. Buckley, 20 Howard, 92.

McCready v. Virginia, 4 Otto, 394.

Bridge Company v. United States, 15 Otto, 491.

Pennsylvania v. Wheeling and Bridge Company. 13 Howard, 518.

Shively v. Bowlby, 152 U. S., 81.

Mann v. Land Company, 153 U. S., 273.

Mumford v. Wardwell, 6 Wallace, 436.

Knight v. U. S. Land Association, 142 U. S., 161-177.

In Illinois Central Railroad Company v. Illinois, Mr. Justice Field, in delivereing the opinion of the court, said:

"The state of Illinois was admitted into the Union in 1818, on an equal footing with the original states in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio river, out of which the state was formed. But the equality prescribed

would have existed had it not been thus stipulated. There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits.

"It is the settled law of this country that the ownership of, and dominion and sovereignty over lands covered by tide waters within the limits of the several states, belong to the respective states in which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations among the states."

The state of Iowa claimed the title to the land in question under the rights conferred upon it by the deed of cession to the United States, and by the treaty of 1803 between the United States and France, as guaranteed by the constitution and the laws of the United States to each of the several states composing the federal union, and the fact that the state court upheld the authority of the United States in issuing a patent to the state of Iowa to the land in question as swamp lands, under the act of congress of 1850, in no wise prevents the plaintiff in error from having its right and claim reviewed and determined by this court upon a writ of error, as such decision is adverse to the right claimed by the plaintiff in error, and falls within the provisions of Section 709.

In Banks v. The Mayor, 7 Wallace, 16, it was held that where an act of the state legislature authorized the issue of bonds, by way of refunding to banks such portions of a tax as had been assessed on federal securities made by the con-

stitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue such bonds refused to sign them because, as they alleged, a portion of the securities for the tax on which the bank claimed re-imbursement was in law not exempt, and the highest court of the state sanctioned such refusal, that its decision was against a right, privilege or immunity claimed under the constitution or statute of the United States, and that this court had jurisdiction, under the judiciary act, to review, and affirm or reverse the decision of the state court upon a writ of error.

Mr. Chief Justice Chase, in delivering the opinion of the court, said:

"The first question to be considered is one of jurisdiction. It is insisted on behalf of the defendants in error that the judgment of the New York Court of Appeals is not subject to review in this court. * * * But it was objected, on the part of those officers, that the particular description of obligations of the tax on which the associations claimed re-imbursement, were not exempt from taxation.

"The associations on the other hand insisted that these obligations were exempt, under the constitution and laws of the United States. If they were so exempt, the associations were entitled to the relief which they sought.

"The judgment of the Court of Appeals denied the relief upon the ground that certificates of indebtedness were not entitled to exemption.

"Is it not clear that in the case before the state court a right, privilege or immunity was claimed under the constitution or under the statute of the United States, and that the decision was against the right, privilege or immunity claimed?

"And further, that the jurisdiction of this court to review that decision is within the express words of the mandatory act of February 5, 1867?

"There can be but one answer to this question. We find no ground for doubt on the point of jurisdiction."

Can it not be said with equal force as to the case at bar, that the state of Iowa claims title to the land in question under the constitution and statutes of the United States, and under the deed of cession and treaty referred to, and the the highest court in the state of Iowa has denied that the state has such right and title, and therefore this court has jurisdiction to review that decision, under the provisions of Section 709?

In Trebilcock v. Wilson, 12 Wallace, 687, it is held where a plaintiff in error set up in the court below that he was entitled to have a note held by him and made by the defendant in error paid in gold or silver coin, under the constitution, and the decision of the court below was against such right, this court has the right to review such decision upon a writ of error.

Mr. Justice Field, in delivering the opinion of the court, said:

"There is, however, a preliminary question of jurisdiction raised, which must be first disposed of. The state court, in holding the tender legal and sufficient, sustained the validity and constitutionality of the act of congress declaring the notes a legal tender. Its decision was, therefore, in favor of, and not against, the right claimed by the plaintiffs under the act of congress, and hence it is contended that the appellate jurisdiction of this court does not arise under the 25th section of the Judiciary Act of 1789. Some support is given

to this view by the decision of this court in Roosevelt v. Meyer, 1 Wallace, 512 where it was held that, as the validity of the legal tender act was drawn in question in that case, and the decision of the state court was in favor of it, and of the right set up by the defendant, this court had no jurisdiction to review the judgment, and a dismissal of the case was accordingly ordered. The court in that case confined its attention to the first clause of the 25th section of the Judiciary Act, and, in its decision, appears to have overlooked the third clause. That section provides for the review of the final judgments and decrees of the highest court of a state in which decisions could be had, in three classes of cases:

"First. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.

"Second. Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity.

"Third. Where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the constitution, treaty, statute or commission.

"Under the last cause the appellate jurisdiction of this court in the case of Roosevelt v. Meyer might have been sustained. The plaintiff in error in that case claimed the right to have the bond of the defendant paid in gold or silver coin under the constitution, upon a proper construction of

that clause which authorizes congress to coin money and regulate the value thereof and of foreign coin; and of those articles of the amendments which protect a person from deprivation of his propery without due process of law; and declare that the enumeration of certain rights in the constitution shall not be construed as a denial or disparagement of others retained by the people; and reserve to the states or the people the powers not delegated to the United States or prohibited to the states.

"The decision of the court below being against the right of the plaintiff in error claimed under the clauses of the constitution, the construction of which was thus drawn in question, he was entitled to have the decision brought before this court for re-examination.

"In the present case, as the defendant claimed a similar right upon a construction of the same and other clauses of the constitution, and a like adverse decision of the court below was made, he is equally entitled to ask for a re-examination of the decision.

"But the defendant also claimed a right to demand coin in payment of the note of the plaintiff by the acts of congress regulating the gold and silver coins of the United States, and making them a legal tender in payment of all sums according to their nominal or declared values, contending that the act of 1862 making notes of the United States a legal tender for debts, did not apply to the contract in suit. He thus claimed in fact, although he did not state his position in this form, that, upon a proper construction of the several acts together, he was entitled to payment in coin. This right having been denied by an adverse decision, he was clearly in a condition to invoke the appellate jurisdiction of this court for a review of the decision.

"Nor is the appellate jurisdiction of this court, in this case, affected by the change in the language of the third clause of the twenty-fifth section of the Judiciary Act of 1789, by the second section of the amendatory judiciary act of February 5th, 1867. By this clause in the latter act the judgment or decree of the highest court of a state can be reviewed, 'where any title, right privilege or immunity is claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority.'

"The section came incidentally before the court at the last term, in Stewart v. Kahn, 11 Wallace, 502, but it was not deemed necessary to determine whether it has superceded the twenty-fifth section of the Judiciary Act of 1789. As there observed, it is to a great extent a transcript of that section; and several of the alterations of phraseology are not material. The principal addition is found in the second clause, and the principal omission is at the close of the section. But in this case, as in that, there is no occasion to express any opinion as to the effect of the new section upon the original. Under the new section, as under the old, if that be superseded, the plaintiff in error can seek a review of the decision made against the right claimed by him."

In the case of Magwir v. Tyler, et al., I Black, 195, the Secretary of the Interior, over-ruling the decision of the Surveyor General, held that the representatives of one Brazeau had no title to certain lands in the state of Missouri, which they claimed under the original Spanish grant, and

Spanish certificates which had been made when the territory comprising the state of Missouri was a part of the territory of Louisiana. The supreme court of Missouri affirmed the ruling of the Secretary of the Interior, and rendered a decision against Magwir, who claimed from Brazeau, holding that he had no title to the land in question. Magwir sued out a writ of error to the state court of Missouri, and the case was brought to this court for hearing upon such writ. A motion was made to dismiss the writ for want of jurisdiction, upon the ground that no question was involved which gave this court the right to re-examine and affirm or reverse the case.

In deciding this question, Mr. Justice Catron said:

"But Brown's certificate identified its locality and boundary, and fixed the title to the land subject to be sued for and recovery by the local laws of Missouri. And the bill was filed to assert this title, on the ground that the Secretary of the Interior Department had no authority to set aside the certificate, divest Brazeau's title, and locate the land elsewhere. The construction of the acts of congress conferring power on the secretary to do the acts complained of, were prominently drawn in question and the decision below rejected the title set up by maintaining the validity of the secretary's decision.

"The case falls within the principles declared in Lytle's case, 22 Howard, 202. The finding of the state court and the decree founded on that finding, show that the question necessary to give this court juridiction was raised and decided."

In Lytle's case, referred to, 22 Howard 193, it was held:

"Where the decision of a state court was against the valid-

ity of an entry of land which had been allowed by the proper officers of the United States, this court had jurisdiction under the judiciary act to hear the case upon writ of error, and revise the judgment of the court below."

In Dooley v. Smith, 13 Wallace, 604, Dooley being indebted to Smith in the sum of about ten thousand dollars, made a tender of greenbacks to Smith of the amount due upon his note; this tender was refused by Smith. Dooley brought the money into the state court, and filed a petition asking the cancellation of the note and the mortgage securing the same. To this petition, Smith filed a general demurrer, and also brought an independent action against Dooley to recover the amount due upon his note in which Dooley answered, setting up the tender, etc.

The two cases were consolidated, and the court found against Dooley and in favor of Smith, and rendered a judgment of foreclosure for the amount found to be due upon Dooley's note.

The supreme court of Kentucky affirmed this decision, and Dooley brought the case to this court upon a writ of error. This decision drew into question the validity of the legal tender act of the United States, and Mr. Justice Miller, speaking for the court, held that such fact gave this court jurisdiction.

In Pennywitt v. Eaton, 15 Wallace, 380, Eaton sued Pennywitt in the Pulaski county court of Arkansas upon the record of a judgment rendered by the Fourth District court of New Orleans, that court, when the judgment was rendered, having been held by a judge appointed by the military governor of Louisiana.

On the trial, the court was requested by the defendant to hold that if it appeared from the evidence that the judge

who presided at the New Orleans court and rendered the judgment therein held his office by appointment of a military governor of the state of Louisiana, and under no other authority, the judgment rendered by said court was void.

The Pulaski court refused to so hold, and held the judgment of the New Orleans court valid. This holding was affirmed by the supreme court of Arkansas. The cause was brought to this court upon a writ of error sued out by Pennywitt. Chief Justice Chase, in rendering the opinion of the court, said:

"The Pulaski county court was requested to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment there, held his office by appointment from a military governor of the state of Louisiana, and under no other authority, the judgment was void. This raised, though somewhat obscurely, the question whether the court so held had any jurisdiction under the constitution of the United States, and the question was decided against the privilege claimed under the constitution by the defendants.

"We cannot, therefore, dismiss the case for want of jurisdiction, although we may have a very clear conviction that the decision of the state court was correct."

In Murdock v. City of Memphis, 20 Wallace, 590, the ancestor of Murdock conveyed to the city and one Wheatley, a certain tract of land, to be thereafter conveyed to the United States, for the purpose of a navy yard. After the government had taken such conveyance, it was decided not to use the land for a navy yard, and a re-conveyance thereof was made by the United States to the city of Memphis. Murdock then brought suit against the city of Memphis to recover the title to the land, alleging that it was conveyed by his ancestor

to the city, in trust, and for the purpose of being used for a government navy yard, and as the government had declined to use it for that purpose, and re-conveyed it to the city, the title thereof reverted to the original owner, and Murdock as his legal heir was entitled to recover the same.

The state court found against Murdock, and dismissed his bill. The supreme court of Tennessee affirmed this decree. Murdock brought the cause to this court upon a writ of error, and the question of jurisdiction was squarely raised in the case.

The opionion, which is by Mr. Justice Miller, is a very able and exhaustive one, in which the judiciary acts of 1779 and 1867 are carefully compared and distinguished, the holding of the court being that in as much as Murdock, the plaintiff in error, claimed his title to the land in question under an act of the United States government, viz:—the abandonment of its use for a navy yard and the conveyance thereof to the city of Memphis, such claim was a right claimed by him under an act and authority of the United States, and the state court having denied such right, this court had jurisdiction under section 709 of the Judiciary Act of 1867 to hear the case upon a writ of error, and to affirm or reverse the judgment of the state court.

Under the principle laid down in these cases, it seems clear that this court must hold that it has jurisdiction of this case, for the reasons,—

First. That the state claims the title to the land in question through the deeds of cession, treaties and acts of congress referred to, and that the decision of the state court was against such right thereunder claimed by the plaintiff in error.

Second. That the government survey of the public domain of Iowa by which the lake and lake bed in question were segregated and set apart by meander lines, from the lands which the government held in trust for the people of the United States, and the approval of such survey and segregation by the surveyor general and the commissioner of the general land office, was an adjudication by the government of the United States, by its duly authorized officers and agents that the lake and lake bed so segregated and set apart by such survey were the property of the state of Iowa, and not a part of the public domain which the general government held in trust for the people of the United States.

And as the state now claims title thereto under such adjudicatory act of the government, and the state court having denied such title, this court has jurisdiction to hear the case upon a writ of error, and to affirm or reverse the judgment of the court below.

Under the authority of these cases, we submit that this court must hold that there has been drawn into question in this cause a claim to a right and title under the constitution and statute of the United States, and under the authority exercised by the United States, the decision whereof by the state court is against the right and title claimed by the state of Iowa.

III.

Is there another question, not a federal question, also involved in this cause, which has been decided adversely to the plaintiff in error, the decision of which is sufficietn to sutain the judgment of the state court irrespective of what its decision may have been upon the federal question involved?

It appears to have been the thought of counsel in framing his motion to dismiss, that the holding of the state court that the governor was authorized to request a patent of the land in question from the general government, and to issue a patent to Humboldt county under the Swamp Land Act, and that the county took title to the lands thereunder which was afterward by conveyances transferred to the defendant in error, is sufficient to uphold the judgment rendered in the cause without drawing into it the federal question involved.

The contention of counsel upon this proposition appears to us to be erroneous, as every question determined by the state court relating to the issuance of a patent from the general government to the state of Iowa, and from the state to the county, necessarily rests upon the determination of the vital question which lies beneath every proposition in this case, that is: Did the state acquire title to the land in question by virtue of its sovereignty, and not through any grant from the general government?

If the state of Iowa acquired title to the land by right of sovereignty, no grant from the general government can add to that title. If it was not in fact a part of the swamp land of Iowa, as designated by the act of congress of September 28, 1850, the patent issued by the governor to Humboldt county was absolutely void, as no power or authority was lodged in him to convey any lands belonging to the state, except those included within the swamp land grant.

In holding the patent from the general government to the state and from the state to the county valid, the state court necessarily held that the state acquired no title to the land under its rights of sovereignty, and its decision rests entirely upon the determination of that question.

If the question as to whether the state took title to this land by virtue of its sovereignty had been determined by the state court in favor of the state, that court could never have found that the patent issued by the general government to the state, and by the governor to Humboldt county, had any force or validity in law. By holding adversely to the claim of the state as to its title in the land, the state court was able to say that these patents were valid and conveyed a valid title.

In Doolan v. Carr, 125 U. S. 618, is is said:

"There is no quesion as to the principle that when the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void for want of power in them to act on the subject matter of the patent, and not merely voidable."

The entire case, of the plaintiff in error, rests upon the proposition that it is the owner by right of its sovereignty of the land in question, and that no act of the general government, and no act of its own officers, can alienate its title thereto. All other questions involved in the case are collateral, and their determination by the state court, either in favor of or against the plaintiff in error, depends wholly upon the determination of the one question upon which the state's case rests.

We therefore submit that the decision of the state court does not rest upon the determination of any other question than the federal question drawn into the case; and that the cause falls within the provisions of section 709 of the Judiciary Act.

It is true that defendant in error contends that the state is estopped by the action of the governor in requesting a patent of the land from the United States government, and by having executed and delivered in the name of the state a patent therefor to Humboldt county. But this contention, as every other one involved in the case rests upon the soundness or the unsoundness of the contention of the plaintiff in error, that it holds title to the land in question by its right of sovereignty as a state.

The only theory upon which it can be claimed that the patent from the government to the state, and from the state to Humboldt county, was valid and effective, is that the land in question was a part of the swamp lands of the government within the boundaries of the state, and passed to the state under the act of congress of 1850. If it was not a part of the swamp land as designated by the United States government, and did not in fact pass to the state under the swamp land grant, and there was neither fraud nor mistake in the original survey thereof, the contention of defendant in error that the state is now estopped from claiming title to the land because of the act of its agent in requesting a patent from the general government, and in executing one to Humboldt county, cannot be maintained.

It is conceded that the land in question was the bed of a meandered lake and was excluded from the original government survey, and was not surveyed or designated upon the government plat as swamp land.

The rules adopted by the general land office for the survey and platting of government lands have the force and effect of law. They prescribe the means for ascertaining and defining the lands which are to be disposed of by the government for the benefit of all the states, and of excluding from such survey any portion of the territory to which the general government did not take title under deed of cession or treaty, through which it acquired title to the public domain. These rules and instructions also require the location and description of public waters left to the control of the sovereign state.

One of the instructions which has been approved by congress and the courts is as follows:

"You are also to meander in manner aforesaid all lakes and deep ponds of the area of twenty-five acres and upwards; also all navigable bayous. Shallow ponds readily drained or likely to dry up are not to be meandered."

In construing the act of September 28, 1850, John Wilson, commissioner of the general land office, in giving directions to the surveyor general of Arkansas relative to the selection of swamp lands, said:

"It is required by the act 'that in making out a list and plats of the land aforesaid, all local subdivisions, the greater part of which is wet and unfit for cultivation,' shall be included in said list and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded there from. * * * * * Satisfactory proof should be presented to you that the greater part of each forty acre lot claimed by the state is wet and unfit for cultivation, before certifying it as such under the law. When this fact is shown by the plats and field notes, it will be regarded as

conclusive that the land is of the character enuring to the state under the law."

In reply to the recommendation that a former approval of certain swamp lands in the state of Missouri be revoked and striken from the lists, J. Thompson, secretary of the interior made the following ruling:

"Department of Interior, Dec. 29, 1857.

In my opinion the approval and certificate of my predecessor are the completion of a duty in regard to swamp and overflowed lands imposed on the Secretary of the Interior by said act of September 28, 1850, and his act cannot now properly be reviewed or recalled. The state authorities have a right to call for a patent or patents pursuant to certified lists, unless fraud or mistake has been discovered. * * * * * *"

Under these rules, regulations and decisions of the Department of the Interior, the survey and platting of lands by that department, and the approval of such plat by the agents of the government, in the absence of fraud or mistake, is a complete adjudication as to what land the government claims under deed of cession or under treaties by which it receives title, what lands are swamp or overflowed lands, and what lands and waters it excludes from its survey as belonging to the state by right of sovereignty.

In Heath v. Wallaces, 138 U. S., 573, it is said:

"It is settled by an unbroken line of decisions of this court in land jurisprudence, that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding upon the courts of the country."

The land in question was not surveyed or platted, or

marked upon the plat of the lands of the township in which it is located, as swamp land. It was excluded from the government survey as land owned and held by the state under its right of sovereignty. Such survey and plat were approved by the department of the interior. That approval, in the absence of fraud or mistake, was a final adjudication that the land was not in fact swamp land, and that the state held the title to the lake thus meandered and excluded from the government survey, by right of sovereignty.

It therefore follows that the patent afterward made by the Secretary of the Interior to the state of Iowa, was without force or validity, and that the state acquired no title to such land thereunder, for the reason that it was not swamp land and was not included in the grant of 1850. It not being swamp land, the governor of the state had no power or authority to issue a patent thereof to Humboldt county, and that county took title or right under the void patent issued to it by the agent of the state.

The claim that the state is estopped by the action of its governor in thus attempting to convey to Humboldt county the title to the land in question, must fail for the reason that the state did not in fact part with its title, and Humboldt county acquired no title or right under the patent. Such patent was absolutely void and no question of estoppel can arise thereon.

Fairtitle v. Gilbert, 2 T. R., 169;
Stokes v. Jones, 18 Ala., 734;
Gordon v. San Diego, 101 Calif., 522;
Caffrey v. Dugeon, 38 Ind., 512;
Marion v. Boston, etc., R. C., 107 Mass., 241;
Reinhard v. Virginia Lead Mining Co., 107 Mo., 627;

Collins v. Benbury, 3 Ired. L., 285 (38 Am. Dec., 722).

Nor can an estoppel arise from the unauthorized acts of the agent or officer of the state.

Salem Imp. Co. v. McCourt, 26 Ore., 103;
State v. Brewer, 64 Ala., 287;
Pulaski County v. State, 22 Ark., 118;
Atty Gen. v. Mar., 55 Mich., 445;
Day Land, etc., Co. v. State, 68 Tex., 526.

The decision of the state court therefore rests alone upon the theory that the state is not the owner of the land in question under its right of sovereignty, and no other question is drawn into the case which can support such decision.

IV.

BRIEF AN ARGUMENT UPON THE ASSIGNMENTS OF ERROR.

Seven errors are assigned, and the questions raised by such assignments of error will now be taken up and presented in their order, although it is not deemed necessary to discuss each assignment of error separately, as several are so intimately connected that they may be properly considered together.

FIRST ASSIGNMENT OF ERROR.

The court erred in not holding that the lake beds of all meandered lakes and streams in the state of Iowa belong to said state of trusts for the public by virtue of its sovereignty and that this right does not depend upon any act of congress or any grant from the United States.

It is said in the brief of the defendant in error that the state court did not hold adversely to the plaintiff in error upon the question involved in the assignment of error. While it is true that the state court has made use of an expression which would appear, without investigation as to the real question upon which the decision in fact rests, to support the contention of the defendant in error, a careful reading of the opinion of the state court will disclose that it held adversely to the plaintiff in error upon the question presented by the first assignment.

The judgment of the state court upon the question involved in this assignment is based upon two propositions:

First. That the original survey, when approved by the surveyor general and the department, was not an adjudication as to the character of the lake and lake bed in question, and that in the absence of fraud or palpable mistake, the general government has the right thereafter to again enter upon the land, resurvey the same, and declare its character to be different from that shown by the original survey.

Second. That the state cannot complain if a resurvey of the land is thus made and its character changed from what was shown in the original survey.

Our contention is that the court erred upon both of these propositions. As to the first, it has been universally held by the department of the interior that where the survey of land is correct, it becomes final and effective when the plat is filed in the local office by that officer.

In Frazer v. O'Conner, 115 U. S., 102, it is said:

"There is nothing in the act of 1796 or any subsequent act which required the approval of the commissioner of the general land office before the survey became final and the plats authoritative."

In Tubbs v. Wilhoit, 138 U. S., 134, this court held that the plat made by the surveyors and used in the sale of land was to be considered as an approved plat by the fact that it was used as such, citing Wright v. Roseberry, 121 U. S., 516, and reaffirming the doctrine therein stated.

In Heath v. Wallace, 138 U. S., 573, it is said:

"It is settled by an unbroken line of decisions of this court in land jurisprudence, that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding upon the courts of the country."

And in French v. Fyan, 93 U. S., 169, it is held that if lands are not in fact swamp lands, that fact cannot be shown to take the same out of the list made by the Secretary of the Interior as ascertained from the plat and field notes of the original survey.

The duty of surveying the public domain and determining what lands belong to the general government under its deed of cession or treaty, what are arable lands and what are swamp lands, and what lands and waters the state holds title to under its right of sovereignty, is committed to the department of the interior for its determination; and any decisions made by such department within the scope of its powers and jurisdiction comes under the rule stated in Heath v. Wallace, supra.

There was no fraud or mistake in the original survey which meandered Owl Lake and set it apart as land and water belonging to the state. There has never been any resurvey of such lake, and the original survey has never been by the department of the government held incorrect or erroneous by reason of fraud or mistakes.

Under the holding of this court in the cases cited in a former division of this brief, when the survey of the lake in question was approved by the surveyor general and the department of the interior, or acted upon by the general government in making a sale of the adjoining lands, the lake and lake bed became the property of the state of Iowa under its right of sovereignty, and there is manifest error in the holding of the state court against this contention of the plaintiff in error.

As to the second question involved in this assignment of error, the state court say:

"No doubt this is a general rule, but who may complain of this survey? Surely not the state; for if the general government has power to order a survey because of a mistake, it also has power to determine whether there has been a mistake."

This holding of the state court appears to us to be manifestly erroneous. If it is true that the state holds the title to the lakes and lake beds of the state of Iowa, which have been meandered by the government survey and excluded therefrom, under its right of sovereignty it holds such title in trust for all the people of the state. The benefit of such title is not confined to abutting property owners, but enures to all the citizens of the state.

Whenever the title of the state to the land is questioned, or its right of possession interfered with, not only has the state the right, but it is its duty as trustee holding the title thereof for the benefit of the citizen of the state to at once intervene in whatever form of action or proceeding the question arises, and protect its right and title in and to the land, and thereby

preserve the same for the benefit of the people of the state for whom it holds such title in trust.

If we are correct upon the main contention presented to this court, namely: that the state holds the title to the land in question by right of sovereignty, no argument is required and no citation of authorities is necessary to establish the principle that the state has the right to intervene at all times to protect its title and possession of the property so held by it.

In Railway Co. v. Butler, 159 U. S., 87, a second survey made twenty years after the first and sales of land thereunder, were disregarded. The court, applying the language of Mr. Justice Bradley in Mitchell v. Smale, 140 U. S., 406, said:

"We think it a hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the land bordering thereon or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculaors will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment."

Continuing Mr. Justice Bradley further said:

"We do not mean to say that in running a pretended meandered line the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud, in which case the government would have a right to recall the survey and have it corrected by the courts, or in some other way."

In the case at bar there is no claim that a mistake was made or a fraud perpetrated in the survey of Owl Lake. It

was segregated and excluded from the original survey by the proper officers of the government. All of the land bordering upon the lake was sold under the original government survey. The lake was named on the plat and no part of it was included within the government survey. That survey was not recalled by the interior or other department of the government. More than forty years after a patent is issued by the general government to the state, describing the lake as the unsurveyed portions of sections 21, 22, 27 and 28 in Township 92, Range 27, west of the fifth principal meridian and the defendants in error claim title under the patent issued by the governor of Iowa containing a like description.

The question at issue then is not one where there has been a palpable mistake or fraud in the survey, but where the original survey was correct and as to which no dispute has ever arisen. Under such circumstances can the title to the bed of a meandered lake be conveyed by the general government either to a state or to any person desiring to purchase the same or occupy it for homestead purpose under the laws of the United States?

The case in our opinion falls within the decision of French v. Fyan, supra, that a patent issued by the government either to the state or to an individual for the bed of a meandered lake, which was excluded from the original government survey and was not noted upon the plat, as required by the regulations of the land department, as swamp land, would be absolutely void, and that the state or the individual would take no right or title thereunder.

Recurring to the second question involved in the assignment of error under discussion, the state court certainly erred in holding that the state could not complain of being

deprived of the title and right of possession of the bed of a meanered lake to which it took title under its right of sovereignty.

It is said by defendant in error, "that the state court was not bound to hold that the beds of non-navigable meandered lakes belong to the state of Iowa in trust for the public by virtue of its sovereignty; it might have held, as courts in many of the states have held, that the beds of such lakes belong to the riparian owners and not to the state."

This position is somewhat remarkable, as it assumes that the supreme court of a state has the power to dispose of the property of the state as it sees fit, without regard to the law governing the right of the state to such property. In other words, although the title to the lake bed in question is in the state, and the state holds such title by virtue of its right of sovereignty, the supreme court, without warrant of law, might divest the state of such title and transfer it to an individual.

It has long been the established principle in the state of Iowa that the lands of riparian owners are bounded by highwater mark, and that their title does not extend beyond.

McManis v. Carmichael, 3 Iowa, 1;
Haight v. Keokuk, 4 Iowa, 199;
Tomlin v. Dubuque, etc., R. R., 32 Iowa, 106;
Barney v. Keokuk, 74 U. S., 250;
Noyes v. Collins, 92 Iowa, 566.

And it is said in Shively v. Bowlby, 152 U. S., 44, that the Iowa rule is the correct one, and in accord with the common law doctrine.

Under this rule that the lands of riparian owners upon the lake in question are bounded by highwater mark, and that the state of Iowa holds the title to the bed of the lake under

its right of sovereignty, how can it be said that the supreme court of the state by a decision which it may render, can divest the state of such title and transfer it to an individual? Several cases are cited as holding the doctrine that the ownership of the beds of non-navigable meandered lakes is a question for the determination of the states wherein such lakes are situated.

Without assenting to or dissenting from such proposition, it is a sufficient answer to say that if such contention is true, the disposition of the title to such lakes and lake beds must be by the legislature of the state, and not by its courts; and that in the absence of legislation, whereby the title is divested from the state and vested elsewhere, a decision of a state court that the state is not the owner of the lake and lake bed, segregated from the government domain by meander lines, is an erroneous decision and against the claim of the state to the title of such lake and lake bed under the laws and treaties of the government.

In Shively v. Bowlby, 152 U. S., 49, it is said:

"The congress of the United States in disposing of the public lands has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants in order to encourage the settlement of the country; but that the navigable waters and the soil under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote these purposes, shall not be granted away during the period of territorial government; but unless in case of some international duty or public exigency, shall be held by the United States in trust

for the future states, and shall vest in the several states when organized and admitted into the Union with all the powers and prerogatives pertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piece-meal to individuals as private property, but shall be held as a whole for the purpose of being ultimately distributed and dealt with for the public benefit of the state after it shall have become a completely organized community."

Applying this broad principle of the law to the case at bar, when by the government survey Owl Lake was segregated and set apart from the government survey by meander lines, it was defined and designated as a body of land and water belonging to the state, and in which the government had no title or interest. The state thereupon took and held the title in trust for the public, and nothing short of an act of the legislature of the state can divest such title. It cannot be disposed of piece-meal or to individuals as private property, but is to be held as a whole for the purpose of being ultimately distributed and dealt with for the public benefit. And the supreme court of the state manifestly erred in holding a doctrine contrary to the principles expressed in the quotation above given.

V.

SECOND ASSIGNMENT OF ERROR.

The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the land commissioner of the United States and the Secretary of the Interior, and the sale of the land under such survey,

did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud beyond recall by any subsequent act of the land department.

It is sought to avoid the force of this assignment of error by the claim that the decision of the state court is not against the power of the government to set aside an original survey and order a re-survey, and for that reason a federal question is not drawn into the case upon which an error can be predicted. This appears to us to be a superficial view of the questions involved.

The effect of the decision of the state court is, that the title to the land in question can be taken from the state, after it was vested therein by the approval of the original survey, although there was no fraud or mistake in such survey, and the same had never in fact been set aside by the land department of the government.

This holding involves a federal question which has been decided adversely to the claim of the state under the treaty with France and under the laws of congress.

The determination of what is a lake is vested by law in the surveyor general. He is the tribunal which must determine that fact, and his decision, when approved by the commissioner of the general land office, is final, and when the government has sold the land according to a survey which fixes and determines the boundaries of a meandered lake upon the plat, it has no further interest in such land or lake.

> Grand Rapids & Ind. Ry. v. Butler, 159 U. S., 87;
> Mitchell v. Smale, 140 U. S., 406.

Nor can a survey made by the proper officers be challenged by a collatral attack.

> Russell v. Maxwell Land Grant Co., 158 U. S., 253;
> Kirwan v. Murphy, 83 Fed. Rep., 275.

In Cragin v. Powell, 128 U. S., 691, it is said:

"The power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

In Moore v. Robbins, 96 U. S., 530, Mr. Justice Miller said:

"With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to use for cancellation of the deed of reconveyance of the lands as to individuals, and, if the government is the party injured, this is the proper course."

Again in the same case, referring to the power of the secretary of the interior, it is said:

"He is absolutely without authority. If this were not so, the title derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and, in many cases, unreliable, action of the land office."

In the case at bar no patent was required from the government to vest the title of the lake bed in the state. That title was absolutely vested when the original government survey was approved by the proper officers, or when it was put in use by the government, which was in effect an approval. After such lake had been segregated and set apart from the public domain, and the title thereof had absolutely vested in the state under what principle of law or equity can it be claimed that the government, acting through the land department, can of its own volition recall, cancel or annul the act of the general government, which vested the title in the state, unless such act was tainted with fraud or done through mistake?

In Russell v. Maxwell Land Grant Co., 158 U. S., 256, Mr. Justice Brewer in delivering the opinion of the court, said:

"A survey made by proper officers of the United States and confirmed by the land department, is not open to challenge by any collateral attack in the courts."

And it has been so frequently held by this court that the land department has no further supervision over or interest in the lands after they have been sold according to the plat made and approved, that we almost feel like offering an apology for citing the authorities upon that proposition:

Moore v. Robbins, 96 U. S., 530;
Railway v. Butler, 159 U. S., 87;
Hardin v. Jordan, 140 U. S., 371.

Where no patent is required to convey the title from the government, whatever act is done by the government to indicate a decision and acceptance of the plat and survey, is a final adjudication to the same effect as though there had been a formal approval of the plat by the surveyor general and the commissioner of the general land office under the present statute.

Frasher v. O'Connor, 115 U. S., 102.

In Rogers Loco. Works v. Emigrant Co., 164 U. S., 559, it was held that the acceptance of a list of selected lands was sufficient.

The principle deducible from all of these authorities is, where the department of the government has once acted, either by issuing a patent or designating certain lands within a certain grant, or by meandering, segregating and setting apart as land belonging to the state, lakes and the lands under the waters thereof, and where such survey has not been set aside by the department for fraud or palpable mistake, then the jurisdiction of the land department is at an end and the survey and act of the agents of the government must be held conclusive in the premises. Any other rule would place the property and the rights of the state in its land and waters at the mercy of the land department of the general government.

Under these authorities it appears clear that the state court erred in holding that the survey of the public lands of the United States, the approval of such survey by the land commissioner and the secretary of the interior, and the sale of the land under such survey, did not fix the status of the meandered lakes in the state of Iowa, beyond recall, except for palpable mistake or fraud.

VI.

THIRD ASSIGNMENT OF ERROR.

The court erred in not holding that the land commissioner of the United States had no authority by act of congress or under the constitution, to patent to the state of Iowa any lake beds which had been meandered and were already the property of the state.

This and the fourth assignment of error, which is as follows:

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the land commissioner of the United States had authority to take jurisdiction of the lake beds, and to re-investigate the question after the lapse of forty-four years, and to issue a patent therefor notwithstanding the alleged request of the governor so to do.

Are so nearly indentical that they may be properly considered together.

What has been said with regard to the second, applies with equal force to the third and fourth assignments of error.

The power of the government to issue a patent to land which has been segregated and set aside to the state by a survey which has never been set aside, and to take jurisdiction of lake beds and reinvestigate the question as to whether they should have originally been meandered and set apart to the state, is fairly stated by Mr. Chief Justice Fuller in Railway Co. v. Butler, 159 U. S., 87, who adapted the language of Mr. Justice Bradley in Mitchell v. Smale, 140 U. S., 406, where it is said:

"We do not mean to say that in running a pretended meander line the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud, in which case the government would have the right to recall the survey and have it corrected by the courts, or in some other way. Cases have happened in which by mistake the meander line described by a surveyor in the field notes of his survey, did not approach the water line intended to be portrayed. Such mistakes of course do not bind the government. Nor do we mean to say that in granting lands bordering on a non-navigable lake or stream, the authorities might not formally, by express words, have limited the granted premises to the water edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective states of all swamp and overflowed lands therein, this cannot be done. In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey in 1834-35."

In the case at bar the lake was surveyed and segregated by meander lines from the public domain, more than forty years ago. The government sold all of the land in the township bordering on the lake according to the platted divisions. When this was done it cased to have jurisdiction to recall the survey. The original survey was in fact never recalled, canceled or set aside. The land under the lake was not platted or designated as swamp lands; it did not pass to the state under the swamp land grant of 1850; and the state took its title thereto by right of sovereignty.

Under these facts and the principles of law governing cases of this character, as laid down by the decisions of this

court, the United States government had no authority, either by act of congress or otherwise, to issue a patent to the bed of the lake to the state of Iowa, and had no authority to take jurisdiction of such lake bed, and to re-investigate the question as to whether a lake did in fact exist at the time the original survey was made.

In this connection we again desire to call the attention of the court to the case of Cragin v. Powell, 128 U.S., 692, wherein Mr. Justice Lamar, in delivering the opinion of the court, said:

"It is conceded that this power of supervision and correction by the commissioner of the general land office, is subject to necessary and decided limitations. Nor is it denied that, when the land department has once made and approved a governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in the proper office), and has sold or disposed of lands, the courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interferences or appropriations of corrective resurveys made by the department subsequently to such disposition or sale. But there is nothing in the circumstances of this case which brings it within any such limitations."

In Brown v. Hitchcock, 173 U. S., 478, Mr. Justice Brewer, quoting the language used in Cornelius v. Kessel, 128 U. S., 456, said:

"The power of supervision and correction is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and pay-

ment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest, will be corrected whenever the matter is presented so that the judiciary act upon it."

Under the original survey and the plat made in conformity therewith, the state acquired the title to the land in question as fully and completely as though the same had been patented to the state by the federal government.

Under the decisions of this court, the state could no more be deprived of its property by any subsquent act of the land department of the government, or by any patent issued upon any subsequent survey, than could a private individual be deprived of land which he had purchased, paid for and to which the government had issued him a patent.

The state court therefore clearly erred in holding that the land department of the United States had any authority in or jurisdiction of the lake and lake bed in question, and such holding involves a federal question, for the reason that it divests the state of its title to such land, which it claims under the treaty of 1803, and the acts of congress pursuant thereto.

VII.

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the patent issued for unsurveyed lake beds in the state of Iowa, could not be attacked or investigated by the courts, and that the issuance of said patent was a finality binding and conclusive upon the parties especially the state of Iowa.

It is undoubtedly true that the courts of the United States will adopt and follow the decisions of the highest court of a state, when the same have become rules of property within the state; and that the state courts have the power to determine the boundaries of riparian owners, and to fix the limits either at high or low water mark, or at the center of the stream. But the case at bar is far removed from any question of this character. The state is the plaintiff in error, and is prosecuting this case because the state court has sought to deprive it of the title to land which it took under it right of sovereignty by virtue of the treaties and laws of the United States.

The questions determined in Bondurant v. Watson, 193 U. S., 281, in Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S., 271, in Barnes v. Keokuk, 94 U. S., 324, and other cases cited in defendant's brief, are in no wise involved in the case at bar. The decision of the state court does not fix a rule of property within the state, nor does it define the boundaries of riparian owners. It goes far beyond either of these questions, and seeks to take away from the state itself, property to which it acquired title under its right of sovereignty as fixed by the treaties and laws of the United States.

In rendering its decision, the state court necessarily held that a patent issued by the land department of the government, without any authority of law and including land to which the government held not title whatever, and which was absolutely void at the time that it was issued, was a finality binding and conclusive upon the state.

It is said in Brown v. Hitchcock, 173 U. S., 478, that the power of supervision and correction of surveys and title con-

veyed by the government, can be exerted only when the entry was made upon false testimony or without authority of law.

If the patent was issued by the land department of the United States without authority of law, and to land to which the federal government had no title, it was absolutely void.

In Anderson v. Roberts, 18 Johnson, 527, 9 Am. Dec., 235, it is said:

"A thing is void which is done against law at the very time of doing it, and where no person is bound by the act."

This definition of a void instrument has been universally accepted by the courts of this country.

The patent issued by the government to the state was without authority of law, it was to land which the government did not own, it conveyed nothing to the state, and was of no more force or effect than would have been a patent wrongfully issued by the agents of the government to land which had been previously sold to an individual and to which the title was vested by a previous patent. The state therefore had the right, when such void instrument was sought to be used against it, to investigate its validity whenever and wherever the same was attempted to be used or enforced. By depriving the state of its right to question the validity of the patent, and by holding that the same was conclusive against the rights of the state, the court, in effect, held that no title to the land in question passed to the state under its right of sovereignty, when the same was segregated and set apart by the general government upon the approval of the survey of the public domain. And for that reason a federal question was and is involved in the holding of the state court.

VIII.

SIXTH ASSIGNMENT OF ERROR.

The court erred in holding that the constitution of the United States and the acts of congress prohibited the state of Iowa from questioning the legality of the acts of the land commissioner in taking cognizance of the lake in question, which had been segregated as a lake from the public lands of the United States in 1851, *and issuing a patent therefor under the stamp land act and that the state was bound by the act of the land commissioner in executing such patent.*

This assignment of error raises the same question as the fifth assignment of error, except as to the form in which it is presented. The fifth assignment goes to the validity of the patent itself, while the sixth assignment is as to the acts of the land commissioner on issuing such patent.

In Knight v. U. S. Land Ass'n, 142 U. S., 176, it is said:

"The case as presented by this record involves some very interesting questions. Ever since the decision in Polk's Lessee v. Wendall, 9 Cranch, 87, it has been the settled law of this court that a patent is void at law if the grantor state had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so, and that want of such title or authority can be shown in an action at law. Patterson v. Wynn, 11 Wheaton, 380; Stoddard v. Chambers, 2 How., 284; Easton v. Salisbury, 21 How., 426 Reichart v. Felps, 6 Wall., 160; Best v. Polk, 18 Wall., 112; Smelting Co. v. Kemp. 104 U. S., 636; Steel v. Smelting Co., 106 U. S., 447; Wright v. Rosebery, 121 U. S., 488; Doolan v. Carr, 125 U. S., 618, and authorities there cited."

The principle of law laid down in the quotation above

given is conclusive as to the question involved in the fifth and sixth assignments of error. It is certain that the United States government had no title to the premises embraced in the patent issued to the state, and it is equally certain that the land commissioner who issued the same did so without authority. These propositions established, it follows as a logical sequence, that the state had the right to meet such void instrument whenever and wherever the same was sought to be put in force against its title and to question the authority of the land department of the general government to issue the same. And the state court was clearly in error in holding the contrary rule. A federal question was involved in such decision, for the reason, as before stated, it took away from the state a right which it claimed under a treaty of the United States and under the laws of congress.

It is said in counsel's brief:

"Suppose this court should reverse the case and remand it, and that the supreme court of Iowa should say, 'We care not whether the secretary of the interior had or had not the power to issue a patent; we say, as we have already in substance said before, the state of Iowa under the circumstances of this case, is in no position to complain; only abutting property owners can do that.' Would not the ultimate decision of the case stand just the same as if no writ of error had been taken to this court?"

To this we answer emphatically, No. If this court reverses the case upon the writ of error, and holds that the state of Iowa is the absolute owner of the land in question under its right of sovereignty and by virtue of the laws and treaties of the United States, it must necessarily hold that it has the right to intervene and maintain its title to such land

whenever there is an attempt to deprive it of such title. And whatever decision is afterward rendered by the state court must be in conformity with such holding of this tribunal.

In Smelting Co. v. Kemp, 104 U. S., 636, it is said:

"When we speak of the conclusive presumptions attending a patent for land, we assume that it was issued in a case where the department had jurisdiction to act and execute it. That is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal and goes to the existence of a subject upon which it was competent to act."

IX.

The seventh assignment of error is substantially identical with the fifth, and the argument made as to the fifth assignment of error is applicable thereto. We will therefor submit such assignment without further argument.

X.

In conclusion we respectfully submit that a federal question is drawn into the decision of this case by the state court, which gives this tribunal jurisdiction to hear the cause upon its merits, and that the decision of the state court is manifestly erroneous upon the questions involved in the errors assigned in this court. That the cause should be reversed and remanded to the state court to be there tried in accordance with the rules of law, as determined by the decision of this tribunal.

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